

under prescribed conditions, to construct their facilities prior to license grant.¹⁷⁷ We subsequently determined that Part 22 and Part 90 commercial mobile radio service applicants should be subject to the same rules governing the construction of facilities prior to the grant of pending applications.¹⁷⁸ We later clarified that such rules would extend to successful broadband PCS bidders that had filed a long-form application.¹⁷⁹ Thus, 35 days after the date of the Public Notice announcing the broadband PCS A and B Block Form 600 applications accepted for filing, the parties has filed those applications were permitted, at their own risk, to commence construction of facilities, provided that (1) no petitions to deny the application had been filed; (2) the application did not contain a request for a rule waiver; (3) the applicant complied fully with the antenna structure provisions of Sections 24.416 and 24.816 of the Commission's rules, including FAA notification, and Commission filing requirements; (4) the application indicated that the facilities would not have a significant environmental effect (*see* 47 C.F.R. §§ 24.413(f) and 24.813(f)); and (5) international coordination of the facilities was not required.¹⁸⁰

104. Discussion. We propose to extend the pre-grant construction rules set forth in 47 C.F.R. § 22.143 to all auction winners, regardless of whether petitions to deny have been filed against their long-form applications. We further propose to permit each auction winner to begin construction of its system, at its own risk, upon release of a Public Notice announcing the acceptance for filing of post-auction long-form applications. We tentatively conclude that to do so would further the public interest by expediting, in most cases, the initiation of service to the public. We believe that allowing pre-grant construction furthers the statutory objective expressed in the Communications Act in Section 309(j)(3)(A) of the rapid deployment of new technologies, products, and services for the benefit of the public. Pre-grant construction would be subject to any service-related restrictions, including but not limited to antenna restrictions, environmental requirements, and international restrictions. Finally, we emphasize that any applicant engaging in pre-grant construction activity would do so entirely at its own risk, and the Commission would not take such activity into account in

¹⁷⁷ See Amendment of Part 22 of the Commission's Rules to Allow Public Mobile Service Applicants to Commence Construction After Filing FCC Form 401, But Prior to Receiving an Authorization, *Report and Order*, 4 FCC Rcd 5960 (1989) (rules applied to the Domestic Public Cellular Radio Telecommunications Service and the Public Land Mobile Service); Amendment of Part 22 of the Commission's Rules to Allow Public Mobile Service Applicants to Commence Construction After Filing FCC Form 401, But Prior to Receiving An Authorization, *Memorandum Opinion and Order*, 5 FCC Rcd 6182 (1990)(expanding rules to all Public Mobile Service applicants). The provision was originally codified at 47 C.F.R. § 22.43(d) and now as amended appears at 47 C.F.R. § 22.143.

¹⁷⁸ Implementation of Sections 3(n) and 332 of the Communications Act, *Third Report and Order*, 9 FCC Rcd 7988, 8153 (1994).

¹⁷⁹ See *Public Notice*, "Personal Communications Service Information, Broadband" Report No. CW-95-02 (released Apr. 12, 1995).

¹⁸⁰ *Id*

ruling on any petition to deny although we acknowledge that this could result in significant economic loss to applicants. We seek comment on this proposal.

IV. CONCLUSION

105. Based on the experience we have gained from our completed auctions, we believe the time has come to streamline our competitive bidding rules in order to make our licensing process more efficient. In the past, we have adjusted our auction procedures for different services as we gained experience with the process, and the result is that we have different procedures for different auctionable services. We believe that these rules should be simplified and made uniform wherever possible. Moreover, we do not believe that it is necessary to continue the time-consuming process of conducting rule making proceedings prior to each auction. The *Order* amends Subpart Q of Part 1 of the Commission's rules to reflect procedural changes, including some that have already been made in certain service-specific rules, that we believe would benefit bidders and the auction process generally. In the *Notice of Proposed Rule Making*, we propose changes to our general competitive bidding rules that are intended to simplify our regulations and eliminate unnecessary rules wherever possible. At the same time, we believe these rules will be beneficial in providing more specific guidance on a number of issues to auction participants, while also giving them more flexibility, and increase the effectiveness of our auctions.

V. PROCEDURAL MATTERS AND ORDERING CLAUSES

106. The Initial Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act, is set forth in Appendix C. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

107. IT IS ORDERED that the rule changes specified in Appendix B ARE ADOPTED and are EFFECTIVE 30 days after publication in the Federal Register.

108. IT IS FURTHER ORDERED that the petitions for reconsideration of the *Competitive Bidding Fifth Memorandum Opinion and Order*, to the extent that they are addressed herein, ARE DENIED.

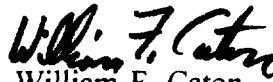
109. Ex Parte Presentations. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

110. Authority. This action is taken pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309 (j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j).

111. Comment. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **March 27, 1997**, and reply comments on or before **April 16, 1997**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten comments must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

112. Additional Information. For further information concerning this rule making proceeding contact Mark Bollinger at (202) 418-0660, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

The following is a list of the competitive bidding procedures that have been adopted in specific services but are not included in the Part 1 rules. As stated in paragraph 17, we invite comment on whether any of these provisions should be incorporated in our general competitive bidding rules.

A. The following rule sections establish a period after the filing of long-form applications during which other parties may petition to deny the grant of licenses to auction winners:

- MDS: Sec. 21.925(d)
- Broadband PCS: Sec. 24.827(b)
- Narrowband PCS: Sec. 24.427(b)
- WCS: Sec. 27.207

B. The following rule sections sets forth Form 600 amendment procedures:

- MDS: Sec 21.926
- WCS: Sec. 27.313

C. The following rule sections indicate what supplemental information an applicant must include with its Form 600:

- MDS: Sec. 21.956
- Broadband PCS: Sec. 24.707
- WCS: Secs. 27.206 and 27.307

D. The following rule sections require bidders to attach an environmental impact statement to the Form 600 if granting the application may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, and impose a continuing duty on licensees to monitor the environmental impact of subsequent construction.

- Narrowband PCS: Sec. 24.413(f)
- Broadband PCS: Sec. 24.813(f)
- WCS: Sec. 27.307

E. The following rule sections affect the amount and due date of down payments owed by

winning bidders:

- DBS: Sec. 100.76(b)
- Broadband PCS: Sec. 24.711(a)(2)
- WCS: Sec. 27.206

F. The following rule sections permit voluntary dismissal and return of applications:

- Narrowband PCS: Sec. 24.428(a)
- Broadband PCS: Sec. 24.828(a)
- WCS: Sec. 27.317(a)

G. The following rule sections describe procedures for amendments to short-form applications:

- Narrowband PCS: Sec. 24.422
- Broadband PCS: Sec. 24.822
- WCS: Sec. 27.204

H. Narrowband PCS rule section 24.420 describes defective applications and how the Commission treats them.

I. Broadband PCS rule section 24.806(d) indicates where applicants should send correspondence regarding their applications.

J. The following rule sections set forth procedures to be followed when mutually exclusive applications have not been filed for a particular license:

- MDS: Sec. 21.927
- Narrowband PCS: Sec. 24.409(b)
- Broadband PCS: Sec. 24.809(b) and Sec. 24.826(a)
- WCS: Sec. 27.321

K. The following rule sections delineate the contents of pre-auction public notices:

- MDS: Sec. 21.952(b)
- Narrowband PCS: Sec. 24.305
- Broadband PCS: Sec. 24.705
- WCS: Sec. 27.204

L. The following rules describe the procedure to follow when tie bidding occurs:

- DBS: Sec. 21.926
- WCS: Sec. 27.202

M. The following rule sections establish minimum activity requirements and allow for activity waivers:

- DBS: Sec. 100.73(e)
- Broadband PCS: Sec. 24.703(f)

N. The following rule sections establish bid withdrawal payments for various auction types:

- MDS: Sec. 21.959(b)
- Narrowband PCS: Sec. 24.304(c) and (d)
- DBS: Sec. 100.74(d)
- WCS: Sec. 27.203

O. The following rules describe procedures for determining unjust enrichment payments:

- MDS: Sec. 21.926
- WCS: Sec. 27.209(d)

P. The following rule sections require audits of bidders who participate in auctions as designated entities:

- MDS: Sec. 21.960(g)
- SMR: Sec. 90.815(d)

Q. The following rule sections require disclosures to be made by designated entities on short-form applications and Form 600s:

- Narrowband PCS: Sec. 24.309(c)
- SMR: Sec. 90.815(b)(3)
- WCS: Sec. 27.204(a)(2)(iv)

R. SMR rule section 90.815(c) requires small business winners to maintain certain records at their principal place of business.

S. The following rule sections establish definitions of "small business" and "consortium of small businesses."

- Narrowband PCS: Sec. 24.320(b)
- SMR: Sec. 90.814(b)
- Broadband PCS: Sec. 24.720(b)
- WCS: Sec. 27.201(b)

T. The following rule sections establish definitions of women- and minority-owned businesses:

- Narrowband PCS: Sec. 24.320(c)
- Broadband PCS: Sec.24.720(c)

U. The following rule sections establish control group definitions:

- Narrowband PCS: Sec. 24.320(h)
- Broadband PCS: Sec. 24.720(k)

V. The following rule sections establish other miscellaneous definitions:

- Narrowband PCS rule Sec. 24.320(g) defines passive equity.
- SMR rules set forth definitions for the following terms:
 1. Sec. 90.814(g): attributable interests
 2. Sec. 90.814(g)(1): multiplier

•Broadband PCS rules set forth definitions for the following terms:

1. Sec. 24.720(h): institutional investor
2. Sec. 24.720(j): nonattributable equity
3. Sec. 24.720(l): affiliate
4. Sec. 24.720(m): publicly traded corporation with widely dispersed voting power.
5. Sec. 24.720(n): qualifying investor; qualifying minority and/or woman investor
6. Sec. 24.720(o): preexisting entity; existing investor.

•WCS rules set forth definitions for the following terms:

1. Sec. 27.210(c): gross revenues
2. Sec. 27.210(d): affiliate

W. Narrowband PCS rule section 24.406(e) and WCS rule section 27.304 establish procedures for applicants to follow when submitting application materials to the Commission.

X. DBS rule section 100.80 sets forth a disclosure procedure in the event of a license transfer.

Y. Broadband PCS rule section 24.710 establishes license acquisition limitations for the C and F block auctions.

APPENDIX B
RULE CHANGES

Part 1 of Chapter I of Title 47 of the Code of Federal Regulation is amended as follows:

PART 1 - GENERAL PROCEDURES

1. The authority citation for Part 1 continues to read as follows:
2. Section 1.2103 (a) and (b) are amended to read as follows:

Sec. 1.2103 Competitive bidding design options.

(a) The Commission will select the competitive bidding design(s) to be used in auctioning particular licenses or classes of licenses on a service-specific basis. The choice of competitive bidding design will generally be made pursuant to the criteria set forth in PP Docket No. 93-253, FCC 94-61, adopted March 8, 1994, available for purchase from the International Transcription Service, Inc., 2100 M St. NW, suite 140, Washington, DC 20037, telephone (202) 857-3800, but the Commission may design and test alternative methodologies. The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding:

- (1) Simultaneous multiple round auctions (using remote and/or on-site electronic bidding);
- (2) Sequential multiple round auctions (using either oral ascending or remote and/or on-site electronic bidding);
- (3) Sequential or simultaneous single round auctions (using either sealed paper or remote and/or on-site electronic bidding).

(b) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses or authorizations, in addition to bids on individual licenses or authorizations. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction. The Commission may also allow bidders to submit contingent bids on individual and/or combinations of licenses.

* * * * *

3. Section 1.2105 is amended by revising paragraph (a)(2) to read as follows:

Sec. 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) * * *

(2) The Form 175 must contain the following information:

(i) Identification of each license on which the applicant wishes to bid:

(ii) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons:

(iii) The identity of the person(s) authorized to make or withdraw a bid:

(iv) If the applicant applies as a designated entity pursuant to Sec. 1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under Sec. 1.2110.

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of Section 310 is pending;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of Section 310 of the Communications Act of 1934, as amended;

(vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(viii) of this section regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid:

(x) Certification that the applicant is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owed to any Federal agency.

* * * * *

4. Section 1.2106 is amended by revising paragraph (b) to read as follows:

Section 1.2106 Submission of upfront payments.

* * * * *

(b) Upfront payments must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

* * * * *

5. Section 1.2107 is amended to by revising paragraphs (b) and (c) to read as follows:

Sec. 1.2107 Submission of down payment and filing of long-form applications.

* * * * *

(b) Within ten (10) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy penalties) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under Sec. 1.2103, however, bidders may be required to submit their down payments with their bids.) This down payment must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Winning bidders who are qualified designated entities eligible for installment payments under Sec. 1.2110(d) are only required to bring their total deposits up to ten (10) percent of their winning bid(s). Such designated entities must pay the remainder of the twenty (20) percent down payment within ten (10) business days of grant of their application. See Sec. 1.2110(e) (1) and (2). Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license or authorization, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable payments. No interest on any down payment will be paid to the bidders.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder (unless it has already submitted such an application, as contemplated by Sec. 1.2105(a)(1)(b)). Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Specific procedures for filing electronically and manually filed applications will be set out by Public Notice. While Form 600 may be filed either electronically or manually, beginning January 1, 1998, all applications must be filed electronically. Those applicants who file applications manually must also include a copy of all attachments and any other supporting documents on a 3.5 inch diskette in separate ASCII text (.TXT) file formats.

An applicant that fails to submit the required long-form application under this paragraph and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the payments set forth in Sec. 1.2104.

* * * * *

6. Section 1.2109 is amended by revising paragraphs (a) and (b) to read as follows:

Sec. 1.2109 License grant, denial, default, and disqualification.

(a) Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following award of the license. Grant of the license will be conditioned on full and timely payment of the winning bid.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within ten (10) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in Sec. 1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in Sec. 1.2107(b) will apply.

* * * * *

7. Section 1.2110 is amended by revising paras (b)(2), (e)(1), (e)(2), and (e)(3) to read as follows:

* * * * *

Sec. 1.2110 Designated entities.

* * * * *

(b) * * *

* * * * *

(2) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S.

citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis: agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. Members of minority groups include Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.

* * * * *

(e) * * *

(1) Unless otherwise specified, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in Sec. 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to Sec. 1.2104(g)(2).

(2) Within ten (10) business days of the grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay default payments pursuant to Sec. 1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

* * * * *

Appendix C

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected impact the policy and regulatory changes in this Notice of Proposed Rule Making, WT Docket No. 97-82, will have on small entities. Written public comments are requested on this IRFA. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines provided above. The Secretary shall send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the U.S. Small Business Administration in accordance with 5 U.S.C. § 603(a).

A. Reason for Action:

The Commission seeks to amend its general competitive bidding rules under the authority of Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), which delegates authority to the Commission to use auctions to select among mutually exclusive initial applications in certain services. These alterations are based on the Commission's experience gained over the course of 12 spectrum auctions, and are designed to provide clarity, ease of administration, and greater fairness to auctions.

B. Objectives:

This NPRM seeks to establish standardized rules for auctions in lieu of the time consuming and administratively burdensome practice of drafting service-specific auction rules. In drafting these proposed rules, the Commission has evaluated the procedures applied in the previous 12 spectrum auctions and has determined that certain changes to the existing general auction rules are necessary to ensure administrative ease, fairness, and flexibility in auctions. The proposed rules would amend Subpart Q of Part 1 of the Commission's rules to reflect procedural changes, including some that have already been proposed and implemented in prior auctions, that the Commission believes would benefit bidders and the auction process generally. The NPRM proposes changes to the general competitive bidding rules that are intended to ~~simplify the~~ regulations and eliminate unnecessary rules wherever possible.

C. Legal Basis:

The proposed action is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 6002, and Sections 2(a), 3(n), 4(j), 302, 303(g), 303(r), 309(i), 309(j), 332(a), 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. 152(a), 153(n), 154(i), 302, 303(g), (303(r), 309(i), 309(j), 332(a), 332(c) and 332(d), as amended.

D. Description of Projected Reporting, Record Keeping and Other Compliance Requirements:

The proposed rules under consideration in this NPRM include the possibility of altered reporting and record keeping requirements for a number of small business entities. Specifically, the NPRM seeks to define major amendments to its FCC Form 175 applications to better inform auction applicants of the type of information which may not be altered after the submission of this application. Additionally, the NPRM proposes to require a uniform FCC Form 600 application to be completed by auction winners. The NPRM also proposes to streamline the Commission's ownership disclosure requirements to allow applicants and licensees who have already filed ownership disclosure forms to incorporate this information on subsequent applications. This alteration will allow for greater ease in applying for spectrum auctions and prevent duplicative filings by auction applicants.

E. Description and Estimate of the Number of Small Entities to Which The Rule Will Apply:

The proposed changes in the competitive bidding rules would affect a number of small entities. There are three ways to define small entities that may be applicable for these proposed rules: 1) SBA's size standards under the SBA's standard industrial code, 13 C.F.R. § 121.201; 2) the Small Business Act's definition of small entities under 15 U.S.C. § 632(a); and 3) the Commission's refined definition of designated entities for the purposes of competitive bidding.

The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction" and "the same meaning as the term 'small business concern' under the Small Business Act unless the Commission has developed one or more definitions that are appropriate for its activities.¹⁸¹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁸²

Wireless Providers

We apply the definition of a small entity that will provide wireless services under SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a

¹⁸¹ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

¹⁸² Small Business Act, 15 U.S.C. § 632 (1996).

radiotelephone company employing fewer than 1,500 persons.¹⁸³ The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. Data from the Bureau of the Census' 1992 study indicates that only 12 out of a total 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees -- and these may or may not be small entities, depending on whether they employed more or less than 1,500 employees.¹⁸⁴ But 1,166 radiotelephone firms had fewer than 1,000 employees and therefore, under the SBA definition, are small entities. However, we do not know how many of these 1,166 firms are likely to be involved in future auctions.

The Commission will continue to formulate its small business definitions on a service-by-service basis. In creating these definitions, however, the proposed item seeks to apply a uniform definition of "gross revenues" which will include all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175).

Given the uncertain number of auctions to be held in the future, the Commission is unable to estimate how many small businesses under any one of the above three definitions would be effected by the proposed changes to the general competitive bidding rules.

Rural Telephone Companies

Neither the Commission nor the SBA has developed a definition for small providers of local exchange services (LECs) located in rural areas.¹⁸⁵ The closest applicable definition under the SBA rules is for telephone communications companies except radiotelephone (wireless) companies.¹⁸⁶ The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 1,347 companies

¹⁸³ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

¹⁸⁴ U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC Code 4812 (issued May 1995).

¹⁸⁵ The Commission does not collect data on the number of rural telephone companies. Therefore, we include information about incumbent LECs generally.

¹⁸⁶ 13 C.F.R. § 121.201, SIC Code 4813.

reported that they were engaged in the provision of local exchange services.¹⁸⁷ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small rural incumbent LECs. We seek comment on the number of rural telcos that may be affected by these proposed rules.

Because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of "small entity" and "small business concerns."¹⁸⁸ Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs.¹⁸⁹ Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."

F. Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

G. Significant Alternatives Minimizing the Significant Economic Impact on Small Entities Consistent with the Stated Objectives:

The Notice of Proposed Rule Making seeks comment on changes to the Commission's auction rules that benefit "designated entity" applicants, a classification that includes some small businesses. Specifically, the NPRM proposes to adopt a uniform definition of "gross revenues" which will be used in future small business size calculations, and alter its definition of attributable investor to which focuses on *de jure* and *de facto* control, rather than the complicated control group equity structure used in previous rule making.

The NPRM seeks comment on usefulness and administrative viability of installment payments as a means of aiding small businesses and other designated entities. If, after receipt of comments, the Commission decides to continue its use of installment payments, the NPRM sets forth a tiered schedule of installment payment terms and interest rates to be used in future auctions. Similarly, the NPRM proposes to adopt a uniform schedule of bidding credits

¹⁸⁷ Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 1 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Dec. 1996) (*TRS Worksheet*).

¹⁸⁸ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *motion for stay of the FCC's rules pending judicial review denied*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order, 11 FCC Rcd 11754 (1996), *partial stay granted*, *Iowa Utilities Board v. FCC*, No. 96-3321, 1996 WL 589204 (8th Cir. 1996) at ¶¶ 1328-1330 and 1342.

¹⁸⁹ See *id.* ¶ 1342.

providing for a 25 percent bidding credit for very small businesses with average annual gross revenues not exceeding \$3 million, a 15 percent bidding credit for businesses with average annual gross revenues not exceeding \$15 million, and a 10 percent bidding credit for businesses with average annual gross revenues not exceeding \$40 million. To ensure that only qualified licensees avail themselves of the benefits afforded to designated entities, the NPRM proposes that future auctions use the broadband PCS unjust enrichment provisions to address assignment and transfers between designated entities and non-eligible entities or those entities who qualify for differing tiers of installment payments or bidding credits.

The NPRM considers several changes to payment procedures which may effect small businesses. With regard to upfront payments, the proposed item seeks comment on whether the Commission's current practice of returning the upfront payments of bidders who have completely withdrawn prior to the conclusion of competitive bidding is in the public interest. The NPRM further proposes to allow winning bidders to make their final payments or second down payment within a short period after the applicable deadline, provided that they also pay a late fee. The NPRM also seeks comment on whether auction winners faced with petitions to deny should be required to make their second down payments at the same time as all auction winners, or whether the deadline for this payment should be tolled during the processing of the petition to deny.

In the case of bidder withdrawal, default, disqualification, the NPRM proposes to continue the Commission's current practice of applying all funds that the bidder has on deposit to the bid withdrawal and default payments owed to the Commission. Where the default payment cannot be determined at the time of default, the NPRM proposes to require a defaulting bidder to pay a deposit of at least three percent of the defaulting winner's bid which is held by the Commission until the final default payment can be established.

For those licensees who avail themselves of installment payment provisions, the NPRM proposes to adopt a one time late payment fee equal to 5 percent for each installment payment submitted late. Under the proposed rules, licensees who do not make an installment payment within 90 days of its due date will automatically receive an additional 90 days to make that payment subject to a late payment fee of 15 percent the total amount of the late payments. Finally, the NPRM would extend the default payment provision defined in Section 1.2104(g), i.e., the difference between the defaulting winner's bid and the subsequent winning bid plus 3 percent of the lesser of these amounts, to licensees who default on their installment payments.